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crystal form of choline ascorbate. The pertinent elements which are set forth in Claims 23 and 24 are, for example, supported by Claims 1, 4, 6, 12 and 13, as well as applicants' disclosure in the context of the Examples and on page 2, indicated line 45, to page 3, indicated line 2, of the application. The subject matter of Claims 25 and 26 is, correspondingly, supported by applicants' disclosure on page 3, indicated lines 19 to 21 and indicated lines 43 to 44, of the application. No new matter has been added.

The Examiner rejected Claims 1, 2, 4 to 8 and 10 to 22 under 35 U.S.C. §103(a) as being unpatentable in light of the combined disclosures of *Spires* (US 4,394,377) and *Klein et al.* (US 2,870,198). In particular, the Examiner asserts in this context that the diffraction characteristics of the choline ascorbate which are specified in applicants' claims would be inherent in a choline ascorbate as referenced by *Spires* or a choline ascorbate obtained in accordance with the process generically addressed in the disclosure of *Klein et al.*

It is, however, respectfully urged that the mere fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic.²⁾ As corroborated by the teaching of *Hoffman* which is referenced by *Spires* regarding the manufacture of choline ascorbate and the teaching of *Gailliot et al.* which was presented by applicants, choline ascorbate can at least assume the form of an oil and the form of a solid having a melting point of from 130-132°C. As such, the teaching of *Hoffman* as well as the teaching of *Gailliot et al.* corroborate that the particularities of applicants' choline ascorbate, ie. a melting point of from 123.5 to 124.4°C or in the range from 123.5 to 124.4°C as is one characteristic of the choline ascorbate crystals having diffraction lines at $d = 3.80 \text{ \AA}$ and 4.55 \AA which are most intense in a range between 3.40 and 4.70 \AA in a 2θ X-ray powder diffractogram, at best, may or may not occur or be present in the prior art.

Assuming arguendo that a person of ordinary skill would obtain applicants' choline ascorbate crystals when conducting the procedure of *Klein et al.* with the necessary starting materials, the fact that the crystals of choline ascorbate differ from what could reasonably be expected based on the teaching of *Hoffman* and *Gailliot et al.* would constitute an unexpected result.

2) *In re Rijckaert*, 9 F.3d 1531, 1534, 28 USPQ2d 1955, 1957 (Fed. Cir. 1993).

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Moreover, to establish a prima facie case of obviousness the choline ascorbate salts of the prior art would need to be produced by identical or substantially identical processes.³⁾ There are, however, distinct differences in the manner in which the prior art manufactures the choline ascorbate and the manner in which applicants' arrive at the novel crystal form of choline ascorbate which is referenced in applicants' claims. On the one hand, applicants' procedure requires that the reaction be conducted at from -10 to 40°C. Klein et al. conduct the reaction of the acid with the base at reflux temperature of the solvent and Hoffman specify a temperature of 45 to 60°C. Also, applicants' procedure comprises adding ethylene oxide to a mixture comprising ascorbic acid and triethylamine whereas Klein et al., Hoffman and Gailliot et al. address procedures in which triethylamine is first reacted with ethylene oxide and the resulting choline is, in a subsequent stage, reacted with ascorbic acid. In light of the distinctly different measures which are taken in accordance with applicants' process for preparing choline ascorbate and in light of the teachings of Hoffman and Gailliot et al. there is, accordingly, no reasonable basis to assume that the choline ascorbate which is referenced in the disclosure of Spires or a choline ascorbate which is obtained when the procedure of Klein et al. is conducted with the necessary starting materials results in applicants' choline ascorbate crystal form.

To establish inherency, the extrinsic evidence must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.⁴⁾ In light of the foregoing it is respectfully urged that the art relied upon by the Examiner cannot be deemed to establish that applicants' invention was prima facie obvious under the provisions of Section 103(a) when applicants' made their invention. Accordingly, it is respectfully requested that the rejection be withdrawn. Favorable action is solicited.

3) In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977).

4) In re Robertson, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999).

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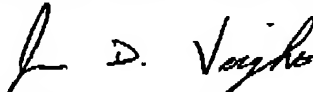
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Respectfully submitted,

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Encl.: CLAIM AMENDMENTS (Appendix I)

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